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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 41952-1-II

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

WILLIAM TY HAND, Respondent,

v.

CHLOE E. PARR. Appellant,

BRIEF OF RESPONDENT

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7. Did the trial court abuse its discretion by barring an expert witness from testifying

because of a discovery violation?

C. STATEMENT OF CASE

The undisputed Findings of Fact support the following recitation. PARR resided on Parcel B since 1946 (parcel to the left of the hedge in Appendix A attached). HAND's predecessor (DeClements) purchased the property immediately contiguous to the north of PARR's (Parcel A) in 1955 (parcel to the right of the hedge in Appendix A). A hedge approximately eight feet from HAND's garage and originally planted in the approximate location of the boundary line together with a pathway on the DeClements/HAND side of the hedge had existed for over 40 years.

In 2000, prior to making an offer to purchase Parcel A from DeClements, HAND and his real estate agent (John Lyall) asked DeClements to show both of them the property boundaries. The area DeClements indicated he was selling included the pathway between the garage and the hedge shown on Trial Exhibit 2 which was admitted without objection (attached hereto as Appendix B).

In August 2009, PARR removed the hedge between the properties and erected a fence over portions of the pathway. CP 2. HAND then filed a Complaint in Superior Court for Prescriptive Easement (later amending the complaint to include an Adverse Possession claim) and

acquired an injunction that stopped further work in the pathway area.

After trial and a visit to the property, the Court stated:

> "[A]t issue in this case is the width of the walkway and what portion is owned by [PARR] and what portion should be found to be owned or used by [HAND] through adverse possession or prescriptive easement."

RP 2. The Court denied the Adverse Possession claim but found HAND had established a Prescriptive Easement, holding:

> The 10 year requirement was met by tacking on to the DeClement's use, and there is indisputable evidence that the DeClement's prior use was in the same manner and the same location. The use was over a uniform pathway. It was openly used and notoriously used. [HAND] went on the property [PARR] claims that she owns and pruned the shrubs . . . [in a] hostile [manner] without permission from [PARR], but she never complained he was trespassing on her land, and the testimony is undisputed again that the full pathway was undisturbed since 1966 to the same location, and it was maintained by the DeClements ahead of time and then by [HAND], so I think the 10 year element has been met.

RP 5. The Court then stated:

> the use was continuous over the full pathway, not limited to a two to three foot width as it is now, and the use was exclusive [not defeated by PARR's] infrequent trips.

Id.

On March 4, 2011, Findings of Fact and Conclusions of Law were presented to and entered by the trial court. Appendix C attached. PARR appeared pro se and made no objection to *any* Finding of Fact or *any* Conclusion of Law. *Id.* Finding of Fact 14, to which error was not assigned, states

> "[HAND] has established a Prescriptive Easement to the pathway in the location and width as shown on Exhibit 2. [HAND] has used the pathway openly, notoriously, exclusively, and hostly in the same location for more than 10 years and in the same manner as used by the DeClements prior to [HAND]'s ownership of the parcel.

CP 2. Conclusion of Law #3, objected to for the first time on appeal, states:

> [HAND] has established a permanent Prescriptive Easement over the pathway location and width as shown in Exhibit 2, which is at its farthest point from the garage eight feet from the garage corner and running along the historical location of the hedge.

CP 2.

The corresponding Judgment awarded HAND "a perpetual easement for use as a pathway beginning at a point eight feet from [HAND]'s garage and extending along the line of a previously existing

hedge line as shown on Exhibit 2 . . . [and PARR] shall restore the pathway at [her] expense to the location, width, dimensions and condition as set forth on Exhibit 2". CP 2.

D. ARGUMENT

1. Finding of Fact #7 is supported by substantial and uncontested evidence.

Finding of Fact #7 states:

> Survey shows that the legal boundary line between the Parr and Hand parcels is approximately two feet from the edge of the garage.

CP 2.

PARR assigns error to this finding claiming:

> Survey shows the distance between the garage and the surveyed boundary line is 2.9 ft at the west end and 4.7 ft on the east end" and that "[t]he area depicted on EX. 2 is 4.7 ft. The hedge was planted parallel, and about 2ft from the boundary line. The edge of the garage is not parallel with the boundary line.

Brief of Appellant at 4-5.

First, PARR made no objection to any Finding of Fact or any Conclusion of Law upon presentation of the same. The Washington Courts have uniformly held that if the trial court's findings are not challenged below, they are treated as verities for the appeal. *See Imrie v.*

Kelley, 160 Wn.App 1, 4, 250 P.3d 1045 (2010)(prescriptive easement case concerning permissive use); *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 768, 129 P.3d 300 (2006); *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *see also* RAP 10.3(g). PARR should not be allowed to challenge this Finding for the first time on appeal.

Second, the appellate Court will uphold the finding of fact of a trial court if there is "substantial evidence" to support the factual finding. *Cingular Wireless, supra.*; *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn.App. 209, 214, 43 P.3d 1277 (2002). *Brin v. Stutzman*, 89 Wn.App. 809, 824, 951 P.2d 291 (1998). Substantial evidence is evidence in "sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Brin*, at 824 (quoting *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992)). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

Here, the evidence is uncontradicted and overwhelmingly supports finding #7. The finding contained the word "approximately" and PARR

has assigned error to a difference disputed to be anywhere between 9 to 35 inches. PARR's witness testified that he drew a line from the two marked "survey" stakes between the two properties and then placed the fence entirely on PARR's side of the boundary line. RP 109-110. The witness further testified the removed hedge was within a couple inches of the property line. RP 119, 126.

In addition, failure to object to the related exhibits results in waiver regarding the issue and the party may not raise the issue for the first time on appeal. CR 59; RAP 2.5(a)(2).

Exhibit 6, admitted without objection, showed a picture of the hedge after it had been removed and a fence which HAND testified "sort of tends to try to go along with what I would assume would be the property line your surveyor would have." RP 42. HAND further testified he measured the distance from his garage to the fence which was "approximately" 42 inches. *Id.*

Exhibit 9, admitted without objection, was a photograph taken by HAND evidencing PARR's newly planted bamboo fence which measured 34 inches from the fence to the corner of Hand's residence. RP 45-46. HAND further testified that before the hedge was cut down the same distance was eight feet. *Id.*

Exhibit 18, admitted without objection, showed a 1992 aerial view

of the properties and the disputed hedge and pathway obtained by HAND from the State Department of Transportation showing the hedge and pathway in the approximate same location as when HAND purchased parcel A in 2000. RP 53.

Finally, this was a claim of prescriptive easement and arguably the position of any surveyed line is not necessary for the court's determination that HAND had established a prescriptive easement. PARR virtually admitted the same in the first sentence of PARR's opening argument: "As your honor can tell, the whole boundary line is not the issue in this case". RP 81. In addition, PARR stated in colloquy with the Court regarding failure to disclose a surveyor in discovery

> The Court: "But you stated in your opening that the boundary wasn't in dispute.
> PARR: The boundary line isn't at issue, but its important to know where the boundary is . . ."

RP 96.

2. Finding of Fact #11 is supported by substantial and uncontested evidence.

Finding of Fact #11 states:

> "Exhibit 2 shows a pathway well established on the [HAND] side of the hedge. Testimony and the exhibits indicate that [HAND] used the pathway in the same manner and location as his predecessor in interest, Mr. and Mrs. DeClements"

CP 2.

PARR claims there is no substantial evidence since "there was no testimony that Mr. DeClements or any member of his family walked over the width of the path, eight feet wide continuously for one year before plaintiff's possession of the property." Brief of Appellant at 5.

First, PARR made no objection to this Finding upon presentation and, therefore, it is treated as a verity for the appeal. *See discussion supra*.

Second, the Finding is supported by the uncontested testimony of both parties. HAND, in offering Exhibit 2 (admitted without objection), testified the Exhibit was a photo from approximately 2009 depicting the pathway and hedge which were "exactly the same" from when he "walked the property with the DeClements." RP 34.

HAND also testified that "Mr. DeClements walk[ed him] along the hedge line as he was showing [him] the property "[b]y his indication the hedge row was the property line." RP 32. HAND further testified that when he was shown the property by the DeClements the pathway had been "historically used because Ms. DeClements . . . had to have used the path in order to maintain her gardens." RP 40.

Upon cross examination of HAND, the following colloquy took place:

> Q: Did [Mr. DeClements] imply or tell you directly that the boundary line was the hedge?
> A: He said that the hedge . . . was the boundary line.

RP 65-66; RP 67.

Finally, even PARR testified that DeClements used the pathway and that she had never told HAND that he was on her property. RP 78.

3. Finding of Fact #12 is supported by substantial and uncontested evidence.

Finding of Fact #12 stated:

> "[HAND] has never excluded [PARR] from his side of the hedge. Both parties trimmed the hedge on an annual basis.

CP 2.

First, PARR made no objection to this Finding upon presentation and, therefore, it is treated as a verity for the appeal. *See discussion supra.*

Second, PARR offers no argument regarding the assignment of error. A party abandons assignments of error unsupported by argument and the reviewing court will not consider it on appeal. RAP 10.3(a)(6); RAP 2.5(a); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (assignments of error unsupported by reference to the record or argument will not be considered on appeal); *Wilcox v.*

Lexington Eye Inst., 130 Wn.App. 234, 241, 122 P.3d 729 (2005).

Regardless, both PARR (RP 94) and HAND (RP 63) testified that they trimmed the hedge. In addition, no evidence was offered by either side regarding any permissive use *by HAND* and even PARR testified that DeClements used the pathway and that she had never told HAND that he was on her property. RP 78.

4. The Trial Court's Findings of Fact support Conclusion of Law 3 (that HAND had met the burden of establishing a prescriptive easement) and judgment ordering PARR to restore the path as it existed in trial exhibit 2.

Conclusion of Law 3 states:

> [HAND] has established a permanent Prescriptive Easement over the pathway location and width as shown in Exhibit 2, which is at its farthest point from the garage eight feet from the garage corner and running along the historical location of the hedge.

CP 2.

PARR assigns error to this conclusion stating it is "erroneous for lack of substantial evidence in the record" and frames the issue as "whether the court properly determined that [HAND] had acquired a prescriptive easement" and whether "the court properly ordered [PARR] to restore part of a path in the width and length shown in a photograph incorporated in the findings." Appellant's Brief at 1-2.

"When . . . conclusions of law are entered following a bench trial, appellate review is limited to determining whether . . . the findings support the trial court's conclusions of law and judgment." *Sunnyside Valley Irrigation Dist. v. Dickie,* 111 Wn.App. 209, 214, 43 P.3d 1277 (2002). When the trial court has weighed the evidence, Conclusions of Law and the resulting judgment will be upheld if they are supported by the Findings of Fact. *Brin v. Stutzman*, 89 Wn.App. 809, 824, 951 P.2d 291 (1998); *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 980 P.2d 1234 (1999); *Cingular Wireless, supra*., 131 Wn.App. at 768.

First, PARR made no objection to this Conclusion upon presentation and, therefore, it is treated as a verity for the appeal. *See discussion supra.*

Second, PARR again offers no argument to support the alleged error. The error is therefore considered "abandoned" and should not be considered on appeal. *See discussion supra.*

Third, to establish a prescriptive easement, HAND had the burden of establishing adverse use that was open, notorious, continuous and uninterrupted for a 10 year period and knowledge of such use by the owner. *Imrie v. Kelley*, 160 Wn.App 1, 250 P.3d 1045 (2010); *Kunkel v. Fisher*, 106 Wn.App. 559, 602, 23 P.3d 1128 (2001); *Dunbar v. Heinrich*,

95 Wn.2d 20, 622 P.2d 812 (1980). Finding of Fact #14 alone, objected to neither here nor below, supports Conclusion of Law #3 and the ordered remedy contained in the Judgment. Furthermore, ALL of the Findings are verities on appeal since none were objected to below and even those Findings objected to on appeal are substantiated by uncontradicted evidence. The undisputed testimony as contained in the Findings are that HAND used and maintained the pathway openly, notoriously, exclusively, hostly, in the same location and manner as his predecessor, with *no* evidence whatsoever of *any* permissive use or objection from PARR, for a period of more than 10 years.

HAND testified that the pathway was "well used," looked like it had been "used forever" and that it was "between six and eight feet wide between the edge of the garage and the hedge" RP 9. HAND further testified that "Mr. DeClements walk[ed him] along the hedge line as he was showing [him] the property "[b]y his indication the hedge row was the property line." RP 32. HAND also testified that when he was shown the property by the DeClements the pathway had been "historically used because Ms. DeClements when . . . had to have used the path in order to maintain her gardens." RP 40. HAND further testified upon cross examination "if you take from the edge of the garage to where the hedge used to be, that's eight feet." RP 68.

Finally, PARR, after examining the picture of the pathway contained in Exhibit 2, testified that the pathway was the same size "historically when Mr. DeClements owned the property" and that the pathway had "never changed" in size for "40 or 50 years." RP 77. PARR then testified that Mr. DeClements used the pathway and had never told HAND he was on her property. RP 78.

Both the Conclusion and the remedy, neither of which was challenged below, are supported by uncontested and uncontradicted evidence.

5. Testimony regarding an alleged communication between PARR and DeClements concerning permissive use was properly disallowed by the trial court based on RCW 5.60.030, commonly referred to as Washington's "Dead Man's Statute"

During questioning concerning the lack of any permissive use given by PARR to HAND, PARR began answering a question "Mrs. DeClements one time, we talked . . . " HAND objected on the grounds of RCW 5.60.030, the "Dead Man's Statute," and the testimony was stricken. RP 78. PARR's counsel then approached the subject again during PARR's presentation by asking "back when . . . DeClements lived there, did you ever tell Mrs. DeClements that she could walk across any portion of your property?" RP 92. HAND objected under the Statute to

which PARR replied "I am not sure, if [PARR] testifies that she told somebody something, that's not Dead Man." RP 93. The Court found appropriately that the statement was part of a "transaction" and sustained the objection. *Id.*

The trial court readdressed the issue in the Court's oral opinion stating:

> I found this was testimony about a transaction with the deceased, and a transaction is defined as testimony about business or management of any affair, and the question is whether the deceased could have contradicted this.

RP 7. The trail court then sustained the objection based on the Dead Man's Statute for a second time. RP 7.

RCW 5.60.030, reads, in part:

> [I]n an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person ... then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, ... person.

On Appeal, PARR argues the Court's ruling was erroneous because "[t]he courts have construed the term transaction quite broadly,

but no prior case has dealt with permission given unilaterally." Brief of Appellant at 6.

PARR's argument is without merit. The test of a "transaction" is whether the deceased, if living, could contradict the witness of his own knowledge. *Estate of Lennon*, 108 Wn.App. 167, 29 P.3d 1258 (2001). Clearly the testimony concerned a transaction about an affair the deceased could have contradicted regardless of who made the alleged statement. There was no error.

6. HAND did not waive his right to resort to RCW 5.60.030 regarding an alleged statement made by PARR to DeClements concerning permissive use when HAND had testified regarding the different subject of DeClement's statements concerning the boundary line of the hedge.

After the Court found the preceding line of questioning regarding permissive use inadmissible under RCW 5.64.030, PARR's counsel stated "we have the same problem with Mr. Hand's testimony with regard to representations about the boundary." RP 93. The court, noting PARR had failed to object to the testimony, sustained HAND's objection. RP 93.

PARR argues on appeal that

> the provisions of the statutes[sic], can be waived *by the introduction of similar evidence by the opposite parties*, who are deceased in the same case.

> *Johnston v. Medina Improvement Club*, 10 Wn.26[sic] 44, 116 P.2d 272 (1941). In this case, [HAND] and John Lyall *testified about the location of the boundary in the area.*

(Emphasis added). Appellant's Brief at 6.

PARR cites *Johnston v. Medina Improvement*, 10 Wn.2d 44, 116 P.2d 272 (1941), in support of the proposition that HAND has "waived" protection of the statute. In that case, the Appellant argued that the trial court erred in allowing officers of the Respondent corporation to testify about conversations they had with a deceased person regarding "circumstances surrounding [a] conveyance to the club." *Johnston*, at 59. The Respondent argued that by introducing testimony relating to the "transaction in question", Appellant, a participant thereto, waived the protective benefits of the statute, and thus, her privilege to object. *Id.* The Court then held that

> "by the introduction of that evidence, appellant waived the protection which the statute affords." [10 Wn.2d 60] 'The logic of the cases is that the party who invokes the protection of the statute must himself respect it.'.

Johnston, at 59-60.

PARR's claim must fail. The "waiver" rule only applies when a party seeks to benefit from the statute and then prevent the opposing

party from explaining testimony regarding the *same subject or transaction.* Estate of Lennon, 108 Wn.App. 167, 29 P.3d 1258 (2001); Robertson v. O'Neill, 67 Wash. 121, 124, 120 P. 884 (1912) (unjust to permit a party to benefit from the statute when the opposing party seeks to "*qualify or explain his testimony*"). The "waiver" rule *does not* apply to an unrelated transaction.

In Estate of Lennon, supra, one of the few cases citing Johnston on the issue, the Court specifically stated:

> The dead man's statute may be waived when the protected party introduces evidence concerning a transaction with the deceased. Once the protected party has opened the door, the interested party is entitled to rebuttal. *A waiver by introduction of testimony about one transaction does not extend to unrelated transactions and conversations.*

(Emphasis added.) Lennon, at 175. In Bentzen v. Demmons, 68 Wn.App. 339, 842 P.2d 1015 (1993), one of the only other cases citing Johnston on the issue, the court stated:

> Once the protected party has opened the door, the interested party is entitled to rebuttal. *Johnston v. Medina Imp. Club*, 10 Wash.2d 44, 59-60, 116 P.2d 272 (1941). However, *a waiver by introduction of testimony about one transaction does not extend to unrelated transactions and conversations.*

(Emphasis added.) *Bentzen* at 345: see also *Estate of Malloy*, 57 Wn.2d 565, 568, 358 P.2d 801 (1961)(waiver as to one transaction or conversation does not extend to unrelated transactions and conversations).

Here, the waiver rule clearly does not apply. *All* testimony from HAND regarding conversations with DeClements concerned *only* the property boundary. The subject of permissive use given from PARR to the deceased DeClements was never approached or discussed in any way. HAND offered Exhibit 14 which was a 2009 photo showing PARR's agent "standing on property Mr. DeClements said I was buying." RP 50. Upon admission of Exhibit 15, a 2009 photo depicting PARR's newly erected fencing, HAND stated the fence was "on property [he] understood after speaking with Mr. DeClements [he was] purchasing." Upon cross examination PARR even inquired upon the subject by asking Did [Mr. DeClements] imply or tell you directly that the boundary line was the hedge?" to which HAND answered "[h]e said that the hedge . . . was the boundary line." RP 65-66. PARR then ended questioning on this issue by stating within a question "Are you telling me that Mr. Declements told you that actually the hedge row, the center of the hedge, or even below that, belonged to you[?]." RP 67

In regards to any testimony from Lyall, it is excluded from the statute by definition. A "party in interest" under RCW 5.60.030 is "one

who stands to gain or lose in the action in question." *Bentzen, supra*. Lyall was not an "interested person" under the statute. In addition, all of the testimony, not objected to, concerned his transaction with the deceased DeClements as to the subject of the location of the boundary line shown to HAND and Lyall by DeClements. RP 7.

The trial court made no error. HAND's only testimony regarding the deceased DeClement's concerned the boundary line. The subject of permissive use given from PARR to the deceased DeClements was never approached or discussed in any way.

7. The trial court did not abuse its discretion by barring an expert witness from testifying because of a discovery violation.

During presentation of his case, HAND discovered that PARR had obtained a survey and would be calling the preparer as an expert witness. HAND requested that the Court not allow introduction of any evidence regarding the same based on PARR's failure to disclose the expert in PARR's Interrogatory answers and requests for document production. PARR argued that he had only just discovered that the potential expert's original 1971 survey had not been recorded and that the survey was necessary to establish "the location of the boundary line." RP 96. The Court responded by noting "But you stated in your opening that the

boundary wasn't in dispute (the first sentence in PARR's opening argument was "As your honor can tell, the whole boundary line is not the issue in this case" (RP 81)) which PARR's counsel responded "the boundary line isn't at issue, but its important to know where the boundary is . . ." RP 96. The Court ruled HAND was entitled to notice of any experts and barred his testimony for failure to disclose. RP 99.

A trial court's discovery rulings are reviewed for an abuse of discretion. *In re Detention of Halgren*, 156 Wn.2d 795, 802, 132 P.3d 714 (2006). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

On appeal PARR claims that

> [n]ormally, witnesses are excluded from testifying when there was a willful breach of discovery. *Alpine Industries v. Gohl*, 30 Wn.App. 750 . . . (1981) and *Hampson v. Romer*, 47 Wn.[App] 806 . . . (1987). The court's ruling prevented admission of survey into the record, and we contend that there wasn't a willful nondisclosure of the survey.

Appellant's Brief at 6.

PARR's claim is without merit. In *Estate of Foster*, 55 Wn. App 545, 779 P.2d 272 (1989), the court found that since there was no

"reasonable excuse" for failure to disclose an expert witness that the noncompliance was "willful." The court then stated:

> Exclusion of testimony is an extreme sanction. Thus, it is an abuse of discretion to exclude testimony as a sanction for discovery violations absent a showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. See *Rice v. Janovich*, 109 Wash.2d 48, 56, 742 P.2d 1230 (1987). A "willful" violation means a violation without a reasonable excuse. *Gammon v. Clark Equip. Co.*, 38 Wash.App. 274, 280, 686 P.2d 1102 (1984), aff'd, 104 Wash.2d 613, 616, 707 P.2d 685 (1985) (declining review on discovery issue). Thus, even an inadvertent error in failing to disclose an expert witness has been deemed willful, justifying exclusion of testimony.

Foster, at 548. See also *Miller v. Peterson*, 42 Wash.App. 822, 825, 714 P.2d 695, *review denied*, 106 Wash.2d 1006 (1986); *Barci v. Intalco Aluminum Corp.*, 11 Wash.App. 342, 351, 522 P.2d 1159 (1974)(the court utilized 11 factors in holding "[t]he most important factor in this case is the prejudice to [the party] from a continuance . . . [and] . . . without [which the party] would have been unable to depose or prepare cross examination of either [expert] concerning their expert testimony").

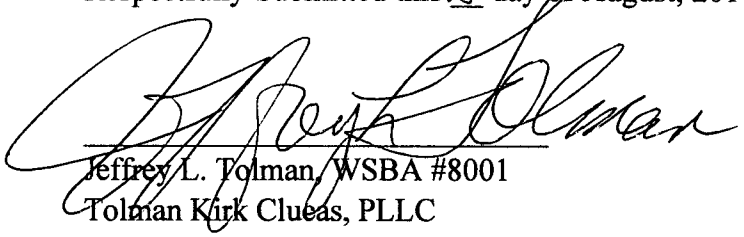
Here, the violation involved the mandates of Superior Court Civil Rules 26, 33, and 34 and their "orders" regarding disclosure. The facts

overwhelmingly support the trial court's ruling and sanction pursuant to CR 37. PARR had no reasonable excuse, conceded the surveyed boundary was not an essential issue in the trial and the violation was "willful" under the cited authorities.

D. CONCLUSION

The trial court should be affirmed on all grounds.

Respectfully Submitted this 15 day of August, 2011,



Jeffrey L. Tolman, WSBA #8001
Tolman Kirk Clueas, PLLC

APENDIX A

(Parcel A)

PAPR (Parcel B)

→ HAND

APPENDIX B

COPY APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KITSAP

WILLIAM TY HAND, a single person,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 09-2-02242-1
	)	APPEAL NO. 41952-1-II
CHLOE E. PARR, a single person,	)	
	)	
Defendant.	)	

VERBATIM REPORT OF PROCEEDINGS

March 4, 2011
Motion for Presentation of Orders

Before the Honorable M. KARLYNN HABERLY

APPEARANCES:

FOR THE PLAINTIFF: JEFFREY L. TOLMAN
Attorney at Law

FOR THE DEFENDANT: CHLOE E. PARR
Pro Se

KATHRYN M. TODD, RMR, CCR
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THE COURT: William Ty Hand and Chloe Parr.

MR. TOLMAN: Jeff Tolman here on behalf of plaintiff, William Ty Hand. I just want to say, I got a certified letter from Ms. Parr. Since Mr. Hackett is still of record, I have not opened it. I certainly did not feel that the rules allowed me to do so.

We have presented findings and conclusions. I have one addition that I want to talk about.

THE COURT: Let me put on the record that I have not had any contact with Ms. Parr this week, but she has been apparently at the courthouse and had quite a bit of contact with our staff, and it's my understanding a staff member provided her copies of the transcript that you have here for your bench copies, that those were provided to her by our staff.

Is that correct?

MS. PARR: Right.

THE COURT: And that through the staff I understood that Mr. Hackett has not returned your phone calls at all and you have tried to contact him. And Mr. Tolman is in a very difficult position. Because you are represented, he can't talk to you, and I understood you had some frustration about that, but ethically he can't talk to you because you have an attorney. Your attorney has not withdrawn. He is putting you in a very

difficult position because he hasn't withdrawn and he's not appeared here today for a mandatory court hearing, and so anyway, it's a very difficult situation, so let me ask you on the record, has Mr. Hackett responded to you since you were here earlier in the week?

MS. PARR: No.

THE COURT: And, so I don't know -- You have gone over these findings here?

MS. PARR: Yes.

THE COURT: And the purpose of these is to see if they say what I said.

MS. PARR: I would like a review, or, either go to court as soon as I get an attorney.

MR. SINDT: Ask her if --

THE COURT: You are not an attorney so you can't talk.

He was going to talk for you it looked like, but you will need to talk for yourself. Which section are you looking at there? What page?

MS. PARR: It's 2.

MR. SINDT: We are talking about -- Sorry.

THE COURT: On the transcript. Okay. Where I talk about the general test for adverse possession?

MS. PARR: Line 18.

THE COURT: Okay.

MR. SINDT: 18 through --

THE COURT: 18 through 20?

MS. PARR: 23.

THE COURT: On page 2. I am looking at page 3.

It doesn't look very grammatically correct when I read it, but it says, "and that the path itself was 35 inches that Hand was entitled to."

MR. SINDT: Can I talk?

MR. TOLMAN: No.

MS. PARR: It's before. On 18, 19, 20, 21, 22.

MR. SINDT: There's --

MR. TOLMAN: Judge, I want to be tolerant. Mr. Sindt certainly shouldn't be up at the bar and he certainly shouldn't be speaking to the court.

MS. PARR: Well, I am here to see if I can have a new attorney. I think I talked to your assistant and that's what he told me, I could just come and say I needed a new attorney. That's what he told me. In fact, I almost have one. He was just about to come in.

THE COURT: He can't come in unless Mr. Hackett agrees to withdraw.

MS. PARR: He might not withdraw for years.

THE COURT: Then there's other remedies

probably, but, anyway, I just wanted to put that on the record what's happened this week so Mr. Tolman knows that you have been up here and I haven't had contact with you, but that's all I have heard is what I just said.

MR. TOLMAN: The only thing that -- after Mr. Hand reviewed the transcript and my proposed findings, he made I think a pretty good point, and that is we would want something added on page 4 of the findings and conclusions that also talks about the water line and the drain tiles and indicates your intent was that they not be moved, disturbed, destroyed, and I didn't have those, so I have some specific language if the court --

THE COURT: I can talk about that. Okay.

The reason I didn't -- In my opinion I said that there was no prescriptive easement for the water line and the drain tiles, and I think that's as far as I could go with giving a remedy here. I understand that Mr. Hand would like an easement for those and not have to move them, but I didn't believe those were within the pleadings, and so I know that doesn't resolve all the issues. That's an unresolved issue and I am aware of that, and whether there's going to be some negotiations between the parties or not as to that, I don't know, but

I guess if you think that I am wrong on that, you can file a motion for reconsideration on it, but I did realize that, but I couldn't find a prescriptive easement and he had no other property rights there.

MR. TOLMAN: As far as the findings and conclusions go, were there other items that you believe did not reflect your ruling?

THE COURT: No. No. But that one, I don't think I can add that one. I do see that it's an unresolved issue and I hoped through counsel there might be some resolution, but ...

All right, Ms. Parr?

MS. PARR: Yeah. On this, I might want to dispute this because there's two different ends he's talking about here.

THE COURT: It was narrow at one end and wider at the other end.

MS. PARR: Exactly. It's kind of a triangle.

THE COURT: Right. That was on your testimony.

MS. PARR: No.

THE COURT: On the exhibit that he drew up. It was 1.9 at one part and 3-point-something at another.

MS. PARR: Yes.

THE COURT: I am aware of that. I think

that's what I said in there.

MR. SINDT: You didn't claim that you own any portions past that.

MS. PARR: I didn't claim that I owned any portion past that.

THE COURT: Well, you claimed you owned where the shrubs were. You mean towards Mr. Hand's house?

MS. PARR: Right.

THE COURT: No, that's true. That's true. Anything else?

MS. PARR: No. I just want to know if I can have an attorney. That's what I want to know.

THE COURT: I am going to enter the findings and conclusions.

I guess the one thing I didn't read in my decision here, did you leave some continuing jurisdiction language in there?

MR. TOLMAN: I did. It is --

THE COURT: Number 3. Okay. All right.

MR. TOLMAN: It's conclusion of law number 5, Judge, and it says, "The court retains jurisdiction to review any disputes over the replacement of the pathway as ordered herein."

THE COURT: Right. I thought that was important. Okay. I will enter the findings as

proposed.

And I don't know what to tell you about Mr. Hackett, but the other attorney you talked to can give you some advice.

MS. PARR: In fact, he was supposed to be here today.

THE COURT: He couldn't appear for you even if he was here.

MS. PARR: I can't hear very well.

THE COURT: He couldn't appear for you even if he was here because the other attorney hasn't withdrawn.

MS. PARR: I asked about that and he said it didn't matter.

THE COURT: He could have come here and asked for a continuance.

MS. PARR: That's what I wanted to know, if we could have a continuance on it.

MR. TOLMAN: Judge, I am going to replace the photocopy with the color copy on the official findings and conclusions and judgment.

THE COURT: That's a good idea.

All right. I have entered the findings and I have retained jurisdiction, so there could be additional matters that come in front of me. I retained jurisdiction so there could be additional matters that

come in front of me having to do with carrying out my orders.

MS. PARR: Excuse me. Is there any way we could have some clear, visible pictures of the originals? They are all -- they are distorted, and tampered with.

MR. TOLMAN: And that is I believe Exhibit 2.

MS. PARR: They have been stretched.

THE COURT: I understand. That's why I went out and did a site visit.

MS. PARR: It's only three feet. That's all he's ever had.

THE COURT: Okay.

MS. PARR: So now what do I do?

THE COURT: I can't give you legal advice.

MS. PARR: I know, but where am I standing right here today?

THE COURT: I have entered the findings, and then I guess he's going to do the restoration work to restore the hillside. Well, you can talk with Mr. Tolman, but you have to restore all the sloping stuff that's been --

MS. PARR: Are you saying that it's over?

THE COURT: Yes.

MS. PARR: We can't have a retrial?

THE COURT: Unless there's an appeal taken to a higher court.

MS. PARR: That's what we want to do.

THE COURT: Well, then you have talked to an attorney apparently.

MS. PARR: Yes, I have.

THE COURT: That attorney can assist you with that. That will allow this to go forward then.

MS. PARR: Okay. That's what I wanted to hear.

THE COURT: This is finished in this court. If you appeal, you can go to a different court.

MS. PARR: I am going to appeal. Thank you.

(The hearing was concluded.)

CERTIFICATE

STATE OF WASHINGTON)
) ss.
COUNTY OF KITSAP)

I certify that the foregoing is a true and correct transcript of the proceedings as taken by me on March 4, 2011, in the matter of Hand v. Parr, Cause Number 09-2-02242-1.

Dated: July 22, 2011

Kathryn M. Todd, RMR, CCR
Official Court Reporter
CCR #2570

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II

WILLIAM TY HAND, Respondent, v. CHLOE E. PARR. Appellant,	Court of Appeals No. 41952-1-II CERTIFICATE AND DECLARATION OF SERVICE OF RESPONDENT'S BRIEF

I, JEFFREY L. TOLMAN, counsel for Respondent HAND, certify under penalty of perjury pursuant tot he laws of the State of Washington that on August 15, 2011, I mailed a copy of the BRIEF OF RESPONDENT to Walter M. Hackett Jr., counsel for Appellant PARR, at 509 4th Street, Room 9, Bremerton, Washington, 98337, and to the Clerk of Division II of the Washington State Court of Appeals, both mailings postage prepaid.

DATED this 15 day of August, 2011.

Jeffrey L. Tolman, WSBA #8001
Tolman Kirk Clucas, PLLC
Attorneys for Respondent